

BEFORE THE POLICE BOARD OF THE CITY OF CHICAGO

IN THE MATTER OF CHARGES FILED AGAINST)
)
POLICE OFFICER ROBERT LOBIANCO,) No. 17 PB 2933-1
STAR No. 16764, DEPARTMENT OF POLICE,)
CITY OF CHICAGO,)
)
AND)
)
POLICE OFFICER KEVIN FRY,) No. 17 PB 2933-2
STAR No. 15329, DEPARTMENT OF POLICE,)
CITY OF CHICAGO,)
)
RESPONDENTS.) (CR No. 1066371)

FINDINGS AND DECISION

On June 29, 2017, the Superintendent of Police filed with the Police Board of the City of Chicago charges against Police Officer Robert Lobianco, Star No. 16764, and Police Officer Kevin Fry, Star No. 15329 (hereinafter sometimes referred to as “Respondents”), recommending that each Respondent be discharged from the Chicago Police Department for violating the following Rules of Conduct, which set forth expressly prohibited acts:

Rule 1: Violation of any law or ordinance.

Rule 2: Any action or conduct which impedes the Department’s efforts to achieve its policy and goals or brings discredit upon the Department.

Rule 14: Making a false report, written or oral.

A hearing on these charges against the Respondents took place before Police Board Hearing Officer Jeffrey I. Cummings on February 27 and 28, 2018. Following the hearing, the members of the Police Board read and reviewed the record of the proceedings and viewed the video-recording of the testimony of the witnesses. Hearing Officer Cummings made an oral report to and conferred with the Police Board before it rendered its findings and decision.

POLICE BOARD FINDINGS

The Police Board of the City of Chicago, as a result of its hearing on the charges, finds and determines that:

1. Each Respondent was at all times mentioned herein employed as a police officer by the Department of Police of the City of Chicago.
2. A copy of the charges filed, and a notice stating the date, place, and time the initial status hearing would be held, were personally served upon each Respondent not fewer than five (5) days before the date of the initial status hearing for this case.
3. Throughout the hearing on the charges each Respondent appeared in person and was represented by legal counsel.

Introduction

4. These cases arise out of an incident that occurred on July 25, 2013. On that date, Respondent Officers Robert Lobianco and Kevin Fry were assigned to the 4th District and working as partners. Respondents were assigned to respond to a call concerning a woman who was screaming for help from within a garage in the 9500 block of South Avenue M. After responding to the scene, Respondents heard a man and woman screaming inside a garage located at 9545 South Avenue M. Respondents approached the garage, announced their office, and pounded on a locked service door. Officer Lobianco then kicked in the service door and both Respondents went inside the garage where they encountered two persons, Frank Vasquez and Cheyenne Bailey. Respondents subdued Mr. Vasquez after a violent physical struggle and arrested him. Respondents stated in their arrest report (written by Officer Lobianco) and case incident report (written by Officer Fry) that Mr. Vasquez was laying on top of Ms. Bailey when

they entered the garage.

Mr. Vasquez was charged with domestic battery and resisting arrest and his criminal trial occurred on November 7, 2013. Both Respondents testified, consistent with their prior reports, that Mr. Vasquez was on top of Ms. Bailey when they entered the garage. Officer Fry further testified that he and Officer Lobianco pulled Mr. Vasquez off of Ms. Bailey. In his defense at trial, Mr. Vasquez disputed Respondents' account of what occurred by presenting a video that he claimed showed that he was standing and trying to open the service door when Officer Lobianco kicked the door in. Mr. Vasquez was acquitted of all charges at the conclusion of the one day bench trial.

Days after his acquittal, Mr. Vasquez filed a federal civil rights lawsuit against Respondents and other defendants alleging that they violated his civil rights in connection with his arrest on July 25, 2013 and his subsequent criminal prosecution. Mr. Vasquez also made a complaint to the Independent Police Review Authority ("IPRA") regarding the alleged misconduct of Respondents. IPRA, which initially closed its investigation because no supporting affidavit was submitted in support of Mr. Vasquez's complaint, reopened its investigation in March 2016 after it received the video footage that Mr. Vasquez presented at his criminal trial. IPRA completed its investigation in January 2017 and the Superintendent brought the charges that are currently at issue against Respondents in June 2017. Respondents have filed a joint motion to strike and dismiss all charges against them and that motion is fully briefed.

After giving careful consideration to the briefing submitted in connection with Respondents' motion to strike and dismiss and the testimony and evidence presented by the parties during the hearing, the Board rules as follows. First, the Board denies Respondents' motion to strike and dismiss. Second, the Board finds that Respondents are guilty of violating

Rule 1, Rule 2, and Rule 14 in connection with Charge 1 and Charge 2 against Officer Lobianco and all Charges against Officer Fry by making false written reports and committing perjury in derogation of 720 ILCS 5/32-2(a). Finally, the Board finds that Officer Lobianco is not guilty of Charge 3 that is brought against him.

A. The Undisputed Facts

Many of the facts in this case are not in dispute. The live testimony at the hearing, Respondents' prior sworn testimony at Mr. Vasquez's criminal trial, Respondents' arrest and case incident reports, and the other evidence in the record establish the following:

In July 2013, Frank Vasquez lived with his ex-girlfriend Cheyenne Bailey on the third floor of a three flat located at 9545 Avenue M. The 9545 Avenue M building had a porch and a detached twenty foot by twenty foot garage. On the evening of July 25, 2013, Mr. Vasquez drove to Olive Harvey College to pick Ms. Bailey up after she finished class. As they drove home, Mr. Vasquez and Ms. Bailey began to argue over some text messages that she had deleted from her phone. The couple's argument continued after they arrived back at 9545 Avenue M and entered the garage. Mr. Vasquez acknowledged at the hearing that both he and Ms. Bailey were screaming at each other in the garage and that she was calling him names and cursing at him. Mr. Vasquez also admitted during his interview with IPRA that he pushed Ms. Bailey at some point during their argument in the garage though he denied ever striking her. At 9:55 p.m. on July 25, an anonymous caller dialed 911 to report that there was a woman in need of help in a garage in the 9500 block of South Avenue M.

Officer Lobianco (who became a Chicago police officer in 2002) and Officer Fry (who became a Chicago police officer in 2003) were on duty on July 25 and working as partners on the 4th District's tactical team. Respondents were assigned to respond to the 911 call and they

received a report on the PDT (portable data terminal) located in their squad car that the 911 caller could hear the woman's screams for help and that he (the caller) was not sure if she was being raped. Respondents arrived at the 9500 block of South Avenue M at around 10:00 p.m. and slowly drove down the adjacent alley with their windows down to locate where the incident was occurring. Respondents heard that the screaming was coming from the garage at 9545 South Avenue M and they stopped their squad car right by that garage. Another squad car with two uniformed officers arrived on the scene roughly at the same time as Respondents.

Respondents exited their squad car and continue to hear yelling and screaming from inside the garage, including a woman asking to be let go and a man stating that she was not going anywhere. Officer Fry banged on the locked overhead garage door that was facing the alley and announced his office (*i.e.*, identified himself as a police officer). Mr. Vasquez did not hear anyone banging on the overhead garage door or announcing their office because he and Ms. Bailey were yelling and screaming at each other inside the garage. Mr. Vasquez and Ms. Bailey were the only persons inside the garage.

After receiving no response, Respondents decided to look for another way to enter the garage. Officer Lobianco, followed by Officer Fry, went around the garage, climbed a neighbor's six foot fence, and went to the locked service door on the other side of the garage. Once he arrived at the service door, Officer Lobianco - - who continued to hear yelling and commotion from inside the garage - - banged on the door, and loudly announced his office (according to Mr. Vasquez, Officer Lobianco shouted: "Open up the f**king door. It's the police.") Officer Lobianco then kicked in the service door and entered the garage. Officer Fry followed behind him and entered the garage five seconds later. Several other uniformed officers followed Officer Fry into the garage. At total of six officers (including Respondents) plus one

supervisor (Sergeant - - now Lieutenant - - Senora Ben) deployed to the scene.

The parties dispute what was Mr. Vasquez and Ms. Bailey were doing when Officer Lobianco kicked in the service door and Respondents entered the garage. The Board will address and resolve this factual dispute in Paragraph 4B below.

After Respondents entered the garage, they engaged in a physical struggle with Mr. Vasquez. Respondents admit that:

- Officer Lobianco delivered several open hand strikes to Mr. Vasquez's head;
- Officer Fry struck Mr. Vasquez more than once with his baton to disable his delivery system (*i.e.*, to prevent Mr. Vasquez from hitting or striking the Officers);
- Respondents used an emergency takedown technique to bring Mr. Vasquez to the ground;
- Officer Fry used an arm bar and a wrist lock to take Mr. Vasquez into custody once he was on the ground;
- Although Mr. Vasquez cocked his arm back, he never took a swing at the officers or landed any blows;
- Mr. Vasquez, who had scratches and bruising about the face and suffered an injury to his right eye, was treated and medically cleared by Trinity Hospital; and
- Respondents did not suffer any injuries during the incident.

After Respondents arrested Mr. Vasquez, Lieutenant Senora Ben arrived at the scene and spoke with Officer Lobianco, who informed her that Mr. Vasquez was on top of Ms. Bailey and punching her with a closed fist when he entered the garage. Lieutenant Ben also spoke with Ms. Bailey - - who was crying, visibly upset, and seemingly distraught - - and offered her medical assistance (which Ms. Bailey declined). Ms. Bailey accompanied Lieutenant Ben back to the 4th District to discuss whether she wanted to pursue charges against Mr. Vasquez. Ms. Bailey decided to sign a domestic battery misdemeanor complaint against Mr. Vasquez, which stated:

In that he/she without legal justification knowingly/intentionally caused bodily harm to Cheyenne N. Bailey, an ex-girlfriend of the defendant (Mr. Vasquez) in that said defendant forcibly pushed complainant causing her to fall on the ground causing pain and scratches on her arms.

Officer Lobianco prepared an arrest report (executed July 25, 2013) in which he stated that Respondents “forced entry into the garage observing Vasquez on top of the victim [Ms. Bailey]” and that Mr. Vasquez became an “assailant” and “active resister” before he was subdued and placed under arrest. Similarly, Officer Fry prepared a case incident report (executed July 26, 2013) in which he stated that Respondents “made forcible entry into the garage and observed Frank Vasquez (offender & ex-boyfriend) on top of Cheyenne Bailey (victim and complainant), who was on the ground with Vasquez physically restraining Bailey.” Officer Fry also noted that Mr. Vasquez was an “assailant” and an “active resister” during the incident that preceded his arrest. Mr. Vasquez was ultimately charged with resisting arrest and “domestic battery – bodily harm.”

Mr. Vasquez’s criminal bench trial took place on November 7, 2013. Both Respondents testified as witnesses for the prosecution. Officer Lobianco testified that when he first entered the garage after kicking in the service door, he saw Mr. Vasquez laying on top of Ms. Bailey off to the left roughly twelve to fifteen feet away from the door. Officer Lobianco also testified that he and Officer Fry were able to take Mr. Vasquez off of Ms. Bailey. Officer Fry testified that he entered the garage five seconds after Officer Lobianco and observed that Ms. Bailey was still on the ground with Mr. Vasquez directly on top of her holding her down. Officer Fry further testified that Ms. Bailey was trying to get away from Mr. Vasquez’s grip and that it took both Respondents to pull Mr. Vasquez off of Ms. Bailey.

In his defense at trial, Mr. Vasquez denied that he was on top of Ms. Bailey when Respondents entered the garage and he presented previously undisclosed video footage in

support of his defense. Mr. Vasquez claimed that this video, which was shot from a security camera mounted outside his third floor apartment at 9545 South Avenue M, showed that he and Ms. Bailey were standing and he was in the process of opening the service door when Officer Lobianco kicked the door in. Mr. Vasquez was acquitted of all charges at the conclusion of the one day bench trial.

Shortly after his acquittal, on November 12, 2013, Mr. Vasquez filed a federal civil rights lawsuit against the City of Chicago, Respondents, and other police officers who responded to the scene alleging that they violated his civil rights in connection with his July 25th arrest and his subsequent criminal prosecution.¹ On December 2, 2013, Mr. Vasquez (through his attorney) also complained to IPRA regarding the alleged misconduct of Respondents. However, Mr. Vasquez did not - - at that time - - provide an affidavit to support his complaint against Respondents and IPRA thereafter notified Mr. Vasquez's attorney on February 6, 2014 that it was closing its investigation for this reason. More than two years later, on March 31, 2016, IPRA reopened its investigation of Respondents based on its receipt of new information (namely, the video footage that Mr. Vasquez presented at his criminal trial) that permitted it to conduct an additional investigation.² IPRA completed and closed its investigation on January 5, 2017 and the Superintendent filed the instant charges against Respondents on June 29, 2017.

¹ The parties settled Mr. Vasquez's civil rights lawsuit with a cash payment to him and agreed to its dismissal on April 2, 2014.

² The CLEAR Status History form attached as Exhibit B to the Superintendent's response to Respondents' joint motion to strike and dismiss indicates that IPRA received and approved a sworn affidavit from Mr. Vasquez on April 27, 2016.

B. Resolution Of The Parties' Factual Dispute Concerning What Mr. Vasquez And Ms. Bailey Were Doing At The Time Respondents Entered The Garage

The principal factual dispute in this case concerns what Mr. Vasquez and Ms. Bailey were doing at the moment Officer Lobianco kicked in the service door and Respondents entered the garage. In their police reports and testimony, Respondents assert that Mr. Vasquez was laying on top of Ms. Bailey holding her down at the time that they entered the garage. Mr. Vasquez, on the other hand, testified that both he and Ms. Bailey were standing and that he was in the process of unlocking the service door when Officer Lobianco kicked the door in. For the reasons stated below, although Mr. Vasquez's testimony was somewhat erratic and uneven,³ the Board finds that his account is more credible for the following reasons.

First, Mr. Vasquez's account was corroborated by the video footage that was recorded by the security camera he had installed outside of his third floor apartment at 9545 South Avenue M. To begin, the Superintendent presented sufficient foundation to establish the admissibility of the video under the standards specified by the Supreme Court in *People v. Taylor*, 2011 IL 110067, ¶35 (2011).⁴ In particular, Mr. Vasquez testified that he installed the security camera

³ On the one hand, Mr. Vasquez enhanced his credibility by providing unflattering testimony about his own conduct. In particular, he did not try to sugar coat the volatile nature of his argument with Ms. Bailey. Indeed, Mr. Vasquez admitted that Officer Lobianco was fully justified when he kicked in the service door and he stated he would have done so himself if he had been outside and heard what was going on inside the garage. He also provided clear and persuasive testimony regarding his security camera and the video footage from the evening of July 25. On the other hand, Mr. Vasquez was a very demonstrative witness who gave narrative and sometimes non-responsive answers on cross-examination. Moreover, he was impeached at the hearing by his prior admission to IPRA that he had pushed Ms. Bailey during the argument in the garage and his testimony that Respondents hit him with a pistol (instead of a baton) and took turns kicking him (instead of striking him in the face with an open hand) was mistaken.

⁴ In *Taylor*, the Supreme Court approved the consideration of the following factors in determining whether a proper foundation has been laid for the admission of a video: "(1) the device's capability for recording and general reliability; (2) competency of the operator; (3) proper operation of the device; (4) showing the manner in which the recording was preserved (chain of custody); (5) identification of the persons, locale, or objects depicted; and (6) explanation of any copying or duplication process." *Taylor*,

and focused it on the service door side of the garage at 9545 South Avenue M because he was the landlord of the building and felt a need to keep an eye on things given the state of the neighborhood. Mr. Vasquez and his cousin installed the camera, which was plugged into a DVR (digital video recorder) that was set up to record activities for up to two weeks before it deleted the footage and began recording again. Mr. Vasquez testified that he knew that the camera was working properly on July 25 because he looked at the camera's video recordings all the time. After his arrest, Mr. Vasquez verified that there was a video recording of the July 25th incident, downloaded the unaltered footage onto a flash drive with the assistance of his brother, and gave the flash drive to his attorney and kept a copy for himself. Mr. Vasquez's testimony, which was unchallenged on these matters, is more than sufficient to establish a proper foundation for the admissibility of the video under *Taylor*.

As to the video footage itself, Mr. Vasquez testified that the video began at 10:00 p.m. on the night of July 25th as indicated by the time stamp on the video itself and it runs until approximately 10:30 p.m. Mr. Vasquez was already inside the locked garage with Ms. Bailey at this time. A few minutes later, Mr. Vasquez heard Officer Lobianco pounding on service door and walked over to unlock the door (which had a lock inside the door knob and a deadbolt lock). At 10:04 p.m., just as Mr. Vasquez started to unlock the bottom door knob lock, the door flew open as Officer Lobianco kicked it in. Mr. Vasquez, who identified his image on the video, was standing approximately three feet in front of the door when it flew open. Ms. Bailey, whose image Mr. Vasquez also identified on the video, was also standing and off to the side. The first officers went towards Mr. Vasquez immediately after they entered the garage and moved to take him down to the ground. On the other hand, Respondents testified, and their counsel argued,

that the video was simply too dark and grainy to see anything of evidentiary value.⁵

The Board has reviewed the video footage and does not agree for the following reasons. The footage between 10:00 p.m. and 10:04 p.m. is quite dark for the most part and it difficult to discern what was occurring in the backyard of 9545 South Avenue M between the building and the garage. Nonetheless, it is possible during that time frame to see a squad car pulling into the relatively well-lit alley in back of the garage and three individual officers walking around the garage into the neighbor's yard adjacent to the garage. When the garage service door opens at 10:04 p.m., the interior of the garage is well-lit and a human figure in white standing near the door with an outstretched arm and a second figure in white standing to the left of the figure with the outstretched arm are visible inside the garage. Since it is undisputed that only Mr. Vasquez and Ms. Bailey were inside the garage prior to the entry by Officer Lobianco, the only reasonable inference is that these two images are Mr. Vasquez and Ms. Bailey, as Mr. Vasquez testified.

As the Supreme Court has recognized, "courts across the country are increasingly relying on video recordings to present an objective view of the facts in a case" and the Board finds that it is appropriate to rely on the video as proof of what occurred within the garage at the pertinent

⁵ Respondents also objected to the admissibility of the video footage on the grounds that the video did not depict how Mr. Vasquez entered the garage with Ms. Bailey. This objection is without merit for three reasons. First, evidence of how Mr. Vasquez entered the garage with Ms. Bailey is irrelevant. The charges presently before the Board focus on what was occurring when the Respondents entered the garage at 10:04 p.m. Mr. Vasquez entered the garage with Ms. Bailey before the 911 call, which occurred at 9:55 p.m., was made. Consequently, evidence of how Mr. Vasquez entered the garage at least ten minutes before the pertinent time has no bearing on the charges. Second, even if the video extended back to the time that Mr. Vasquez and Ms. Bailey arrived back at 9545 South Avenue M, it is unlikely that the video footage would have shown how they entered the garage. This is so because the security camera does not show the overhead door of the garage on the alley-side through which Mr. Vasquez drove his car after he returned to 9545 South Avenue M with Ms. Bailey. Finally, even if these issues were not present, the fact that a portion of the video footage from the evening was missing would not automatically bar the admission of the remainder of the video where - - as here - - it is sufficiently probative. *See Taylor*, 2011 IL 110067, ¶39 (holding that a video should have been admitted notwithstanding the fact that it was missing segments).

time. *People v. Kladis*, 2011 IL 110920, ¶28 (2011) (citing to *Scott v. Harris*, 550 U.S. 372 (2007)).⁶

Second, the Board finds that the credibility of Respondents' testimony about what was occurring inside the garage at the moment Officer Lobianco kicked the door is undercut by several factors. To begin, Respondents' testimony that "it is hard to discern anything from" the video (Officer Fry) and that an image of an arm extending towards the door and another image in white were not visible on the video (Officer Lobianco) is not credible in light of the Board's own review of the video.

Furthermore, in their reports and their testimony during the criminal trial, both Respondents were unequivocally clear that they saw Mr. Vasquez laying on top of Ms. Bailey when they entered the garage. They wrote their reports and gave their testimony at the criminal trial *before* they knew about the video from the security camera. At the hearing, however, both Respondents were aware of the video and they hedged their testimony about Mr. Vasquez being on top of Ms. Bailey by testifying for the first time that they could have been mistaken about what they continue to believe that they saw. This seems, as the Superintendent has argued, to be an effort to avoid a Rule 14 violation/perjury finding by creating a defense that any factually inaccurate statements that they made were simply mistakes and not willful misstatements.

However, the difference between the alternative versions of what occurred is so dramatic that it is simply not possible to believe that Respondents -- both of whom are seasoned tactical

⁶ In *Scott*, the United States Supreme Court reversed the lower courts' denial of an officer's motion for summary judgment on an excessive force claim against him on the ground that the video evidence "clearly contradict[ed]" the plaintiff's version of what occurred such that no reasonable jury could believe it. *Scott*, 550 U.S. at 378-79, 380-81. Consequently, the Court held that the lower courts "should have viewed the facts in the light depicted by the videotape" and found that the officer did not violate the Fourth Amendment. *Id.*, at 380-81.

officers with over a decade of experience with the Department and hundreds of arrests to their credit - - could have been “mistaken” about their testimony that they entered the garage and saw Mr. Vasquez laying on top of Ms. Bailey and acted together to pull him off of her when in actuality both Mr. Vasquez and Ms. Bailey were standing up and apart from each other. Moreover, Respondents’ testimony that he could have made a mistake about such matters in their reports and testimony is at odds with the testimony of six of Respondents’ character witnesses who testified that Respondents were careful, meticulous, and accurate in the preparation of their official police reports.

Finally, the Board finds that Respondents did have a motive to provide false testimony about what was occurring when they entered the garage. It is undisputed that Respondents injured Mr. Vasquez sufficiently to send him to the hospital by hitting him repeatedly with a baton and open hand strikes even though he was unarmed and did not actually swing, hit, kick, or use any force on them during the incident. Respondents’ testimony that Mr. Vasquez was on top of Ms. Bailey holding her down provided a more persuasive justification for their use of force against him and support for the charges of resisting arrest than the actual facts as illustrated by the video would have.⁷

Respondents’ Motion to Strike and Dismiss

5. The Respondents’ filed a Joint Motion to Strike and Dismiss All Charges (“Motion”), requesting that the charges filed against them be stricken and the case dismissed for the

⁷ In making this finding, the Board also considered and gave weight to Lieutenant Ben’s testimony that Officer Lobianco told her at the scene shortly after the incident that Mr. Vasquez laying on top of Ms. Bailey punching her in the face with a closed fist when he (Officer Lobianco) entered the garage. The fact that Officer Lobianco made this false statement to his supervisor contemporaneous with the incident provides further evidence of Respondents’ attempt to create a justification for their use of force against Mr. Vasquez.

following reasons: (a) the failure to bring timely charges violates the due process rights of the Respondents; (b) the charges should be barred by laches; (c) the Superintendent's delay in bringing charges against them violated General Order G08-01 and Special Order S08-01-01 and requires dismissal of the charges.

The arguments raised by Respondents have been previously considered and rejected by the Board. Indeed, the Illinois Appellate Court has in two cases affirmed the Board's decisions to deny motions to dismiss that make essentially the same arguments as put forth by the Respondents. *Orsa et al. v. Police Board*, 2016 IL App (1st) 121709, ¶¶39, 42, 44-45 (2016); *Chisem v. McCarthy*, 2014 IL App (1st) 132389, ¶¶15, 17, 19 (2014). Based on *Orsa* and *Chisem*, and for the reasons set forth below, the Respondents' Motion shall be **denied**.

(A) The filing of charges in 2017 did not violate Respondents' due process rights

The Due Process clause of the Constitution precludes a state or local government from "depriving any person of life, liberty or property [i.e. a public job] without due process of law." Respondents claim - - with citation to *Morgan v. Department of Financial and Professional Regulation*, 374 Ill.App.3d 275 (1st Dist. 2007), and *Lyon v. Department of Children and Family Services*, 209 Ill.2d 264 (2004) - - that the Superintendent's filing of charges against them nearly four years after the underlying incident violates their due process rights. However, Respondents' reliance on *Morgan* and *Lyon* is misplaced: those cases involved a delay in *adjudication* of allegations of misconduct after the respective plaintiffs had been suspended from their jobs—not delay in the *investigation* leading to the initial suspensions. See *Morgan*, 374 Ill.App.3d at 299-305 (finding a violation of the due process rights of a clinical psychologist accused of sexually abusing a patient where the State took fifteen months to decide the case after it suspended the psychologist); *Lyon*, 209 Ill.2d at 282-84 (finding a violation of the due process rights of a

teacher accused of abusing students where the director of DCFS failed to honor specific regulatory time limits for decision-making).

The Respondents' case before the Police Board is fundamentally different from *Morgan* and *Lyon*, as the Respondents are complaining about the delay from the time of the incident to the bringing of charges, not the time it took to try them once the charges were filed and they were suspended without pay. This difference is important because the due-process analysis in *Morgan* and *Lyon* is triggered by the state's decision to deprive the psychologist and teacher of their jobs, thus preventing them from working for prolonged periods of time before they were accorded the opportunity to have a hearing and decision to clear their names.

Here, by contrast, Respondents were working and were being paid their full salary and benefits during the almost four year period from the time of the incident up to the filing of charges with the Police Board in June 2017. Moreover, each Respondent was not suspended without pay from his job until *after* the charges against him were filed. Under these circumstances, any delay in bringing the charges did *not* result in a violation of the Respondents' due process rights. Consequently, the Board - - consistent with the Illinois Appellate Court prior holdings - - rejects Respondents' due process argument. *See Orsa*, 2016 IL App (1st) 121709, ¶39; *Chisem*, 2014 IL App (1st) 132389, ¶15.

(B) Respondents have failed to prove that the doctrine of laches applies in this case

“*Laches* is an equitable doctrine that precludes the assertion of a claim by a litigant whose unreasonable delay in raising that claim has prejudiced the opposing party.” *Orsa*, 2016 IL App (1st) 121709, ¶44. Private parties and public agencies are not on an equal footing when it comes to the application of the laches doctrine. Many cases, including *Van Milligan v Board of Fire and Police Commissioners of the Village of Glenview*, 158 Ill.2d 85, 90 (1994), hold that

laches can only be invoked against a municipality under “compelling” or “extraordinary” circumstances. *See also Hannigan v. Hoffmeister*, 240 Ill. App. 3d 1065, 1075 (1st Dist. 1992) (“*laches* is applied sparingly to public bodies”). In addition, the party that invokes the doctrine of laches has the burden of pleading and proving the delay and the prejudice, *Hannigan*, 240 Ill. App. 3d at 1074, and speculative claims of prejudice are insufficient. *Orsa*, 2016 IL App (1st) 121709, ¶45.

In this case, Respondents assert that laches should apply because “[a] lack of diligence by IPRA in their investigation and the Superintendent in bring charges, and the term of years that has passed between the alleged incident and the bringing of charges, has clearly prejudiced Respondents’ ability to respond to these charges years after they are alleged to have occurred.” Motion, at 9. In particular, Respondents claim that IPRA lack of diligence has resulted in their inability to identify and locate the person who called 911 on the night of July 25, 2013. According to Respondents, “[t]his is especially problematic as the verbatim words on the 911 [call] have been destroyed (regardless of the mechanism) and can never be played or presented.” Motion, at 10. Respondents also assert that the passage of time between the 2013 incident and the 2018 hearing has prejudiced them because their memories have faded. Motion, at 11.

Respondents’ argument are without merit. It is well-settled that “[a] mere time lapse from the accrual of a cause of action to the filing of a lawsuit does not support a *laches* defense.” *Orsa*, 2016 IL App (1st) 121709, ¶44; *Hannigan*, 240 Ill. App. 3d at 1074 (“To assert the defense of *laches*, a party must show more than a mere passage of time”). Indeed, “courts have refused to apply *laches* where there was no showing of prejudice and the parties could obtain a fair trial notwithstanding the delay in bringing suit.” *Van Milligan*, 158 Ill.2d at 92. Thus, the delay between the occurrence of the underlying incident and the filing of charges is not - -

standing alone - - a “compelling circumstance” as a matter of law.

To establish the applicability of laches, Respondents must show that the Superintendent displayed “an unreasonable delay in bringing th[is] action *and* that such delay materially prejudiced” them. *Hannigan*, 240 Ill. App. 3d at 1074 (emphasis added). As an initial matter, the Board does not find that the Superintendent displayed an “unreasonable delay” in bringing the charges against Respondents. IPRA’s investigation of Mr. Vasquez’s complaint against Respondents was completed in less than twelve months of actual investigative time (from December 2, 2013 through February 6, 2014 and from March 31, 2016 through January 5, 2017). IPRA’s decision to close the investigation in 2014 was not the result of any lack of diligence by the agency but was instead caused by Mr. Vasquez’s initial failure to file a supporting in support of his complaint.⁸ IPRA appropriately reopened its investigation in 2016 once it was provided with new evidence (namely, the video footage of the July 25th incident) and it completed its investigation roughly nine months later. Finally, the Superintendent filed the charges against Respondents within a reasonable time after IPRA concluded its investigation.

Even if the Board were to presume that the nearly four-year gap between the underlying incident and the Superintendent’s filing of charges against Respondents was due to the Superintendent’s unreasonable delay (and it was not), Respondents’ attempt to rely on laches fails because they have not demonstrated that the delay caused them any prejudice, let alone the material prejudice that they are required to prove. First, contrary to Respondents’ assertion, the 911 caller was not a material witness. In particular, the caller did not see what was occurring in

⁸ It is likely, as the Superintendent surmised, that Mr. Vasquez did not offer an affidavit to IPRA in late 2013 and early 2014 because his federal civil rights action against Respondents and other defendants was still pending.

the garage at any point in time and he did not even know what garage that the incident was occurring within. Instead, the caller heard screaming and a woman asking for help.⁹ This is the same thing that Respondents heard when they arrived on the scene. Thus, Respondents have failed to identify any *material* witnesses who would have been available to testify but for the delay.

Nor have Respondents shown that the material witnesses (including themselves) had trouble with their overall recollection of the events given the availability of Respondents' prior reports and transcripts from their testimony during the criminal trial to refresh their recollections.

See Bultas v. Board of Fire and Police Commissioners of City of Berwyn, 171 Ill.App.3d 189, 195 (1st Dist. 1988) (refusing to apply laches where "although the evidence was based on recollection testimony, the record indicates that some of the witnesses had the benefit of reviewing prior written statements and not testified doubtfully or with equivocation as to the incidents"); *Orsa*, 2016 IL App (1st) 121709, ¶45; *Chisem*, 2014 IL App (1st) 132389, ¶19.¹⁰

Finally, Respondents have failed to identify any "extraordinary" or "compelling" circumstance warranting the application of laches against the Superintendent. For these reasons, Respondents have failed to meet their burden of proof and their laches defense fails.

(C) The Chicago Police Department's General and Special Orders do not contain an absolute deadline within which investigations of officers must be completed

The Respondent argues that the Superintendent failed to follow Chicago Police

⁹ The 911 audio recording is similarly immaterial to the pertinent issue raised by the charges against Respondents. In any event, the unavailability of the 911 audio recording had nothing to do with any delay in the filing of the charges against Respondents because the parties agree that the recording was no longer available as of December 2013 on account of an inadvertent "system malfunction."

¹⁰ Respondents' reliance on the Illinois Appellate Court's decision application of laches in *Mank v. Board of Fire & Police Commissioners*, 7 Ill.App.3d 478 (5th Dist. 1972), is misplaced. In *Mank*, unlike here, the resolution of the factual dispute was "solely dependent upon recollection" of the witnesses and several material witnesses were not available to testify. *Mank*, 7 Ill.App.3d at 485-86. In this case, the resolution of the disputed factual issue was not solely dependent on the recollection of the witnesses because there is video footage that depicts what occurred at the pertinent time. Furthermore, three out of the four material witnesses testified at length about what occurred.

Department General Order G08-01, which requires a prompt and thorough investigation (Section II.B.), and Special Order S08-01-01, which requires the investigator to complete the investigation as soon as possible within a reasonable amount of time (Section II.F.14), and that his failure to follow these Orders requires the dismissal of the charges against Respondents.

The Board disagrees. As an initial matter, the Board has already found that the Superintendent did not “unreasonably delay” the investigation of the complaint against Respondents. Furthermore, Respondents have failed to show that IPRA’s investigation of Mr. Vasquez’s complaint against them was neither prompt nor thorough, or that IPRA did not complete its investigation within a reasonable period of time. Finally, even if Respondents had established that the Superintendent violated General Order G08-01 and Special Order S08-01-01, the Department’s Orders do not set any absolute deadlines and the violation of the Orders does not provide a basis for automatic dismissal of charges against an officer. *See Orsa*, 2016 IL App (1st) 121709, ¶42; *Chisem*, 2014 IL App (1st) 132389, ¶17; *In re: Poulos*, 17 PB 2932, at 5-6 (February 28, 2018); *In re: Haleas*, 14 PB 2848, at 5 (August 21, 2014). For these reasons, the Board “has not dismissed charges in cases where investigations have taken several years,” *In re: Poulos*, 17 PB 2932, at 5, and it certainly will not dismiss charges where - - as here - - IPRA has completed its investigation within less than twelve months of investigative time. Consequently, Respondents’ request for dismissal for this reason is denied.

Charges Against the Respondents

6. The Respondent, Police Officer Robert Lobianco, Star No. 16764, charged herein, is **guilty** of violating Rule 2 and Rule 14 in that the Superintendent proved by a preponderance of the evidence the following charges:

On or about July 25, 2013, Police Officer Robert Lobianco falsely reported in an Arrest Report for Frank Vasquez, who was arrested on charges related to domestic battery and resisting a police officer, that officers observed Vasquez on top of the victim, referring to Cheyenne Bailey, or reported words to that effect, thereby:

- a. Engaging in any action or conduct which impedes the Department's efforts to achieve its policy and goals or brings discredit upon the Department, in violation of Rule 2; and/or
- b. Making a false report, written or oral, in violation of Rule 14.

See the findings set forth in paragraph no. 4 above, which are incorporated here by reference.

The Collective Bargaining Agreement between the Fraternal Order of Police Chicago Lodge No. 7 and the City of Chicago provides in Article 6, Section 6.1M that "the Employer shall not charge an Officer with a Rule 14 violation unless it has been determined that: (1) the Officer willfully made a false statement; and (2) the false statement was made about a fact that was material to the incident under investigation." Both elements have been proven.

As shown above, the Superintendent has proven that Officer Lobianco's statement that officers observed Mr. Vasquez on top of the victim (Ms. Bailey) was willfully made and false. Furthermore, the statement was material to the incident under investigation. "Materiality is derived from the relationship between the proposition of the allegedly false statement and the issues in th[e] case. . . . The test for materiality for an allegedly perjured statement is whether the statement tends to prove or disprove an issue in the case." *Taylor v. Police Board of the City of Chicago*, 2011 IL App (1st) 101156, ¶35 (2011) (internal quotation marks and citations omitted). "In other words, materiality exists if the statement would or could influence the trier of fact in its deliberations on the issues presented to it." *People v. Rutledge*, 257 Ill.App.3d 769, 771 (3d Dist. 1994) (internal quotation marks omitted). The statement that Mr. Vasquez was laying on top of Ms. Bailey, if believed, would tend to prove that Mr. Vasquez "forcibly pushed [Ms.

Bailey] causing her to fall on the ground" as is alleged in the domestic battery complaint against Mr. Vasquez. Moreover, this statement would or could influence the trier of fact in its deliberations on the issues presented. Consequently, the statement is material.

7. The Respondent, Police Officer Robert Lobianco, Star No. 16764, charged herein, is guilty of violating Rule 1, Rule 2, and Rule 14 in that the Superintendent proved by a preponderance of the evidence the following charges:

On or about November 7, 2013, in the Circuit Court of Cook County, Domestic Violence Division, at the criminal trial of Frank Vasquez, Case No. 13 DV 75854, Police Officer Robert Lobianco falsely testified that on July 25, 2013, he observed Frank Vasquez lying on top of Cheyenne Bailey on the ground in the garage at 9545 South Avenue M, or stated words to that effect, thereby:

- a. Violating any law or ordinance (720 ILCS 5/32-2(a) *Perjury*) in violation of Rule 1; and/or
- b. Engaging in any action or conduct which impedes the Department's efforts to achieve its policy and goals or brings discredit upon the Department, in violation of Rule 2; and/or
- c. Making a false report, written or oral, in violation of Rule 14.

See the findings set forth in paragraph nos. 4 and 6 above, which are incorporated here by reference.

The parties agree that the Superintendent has the burden of proving perjury. *See Taylor*, 2011 IL App (1st) 101156, ¶43. The perjury statute, 720 ILCS 5/32-2(a), provides as follows: "[a] person commits perjury when, under oath or affirmation, in a proceeding or in any other matter where by law the oath or affirmation is required, he or she makes a false statement, material to the issue or point in question, knowing the statement is false." *See also People v. Boyd*, 81 Ill.App.3d 259, 261 (3rd Dist. 1980) ("An essential element of the crime of perjury is knowledge of the falsity of the statements at the time of their utterance" and "such knowledge

may be inferred from proof that the statements in question were in fact false"). As shown above, the Superintendent has proven that Officer Lobianco's testimony that he observed Mr. Vasquez lying on top of Ms. Bailey on the ground in the garage was a knowing false statement made under oath that was material to the charges for which Mr. Vasquez was prosecuted in his criminal trial.

8. The Respondent, Police Officer Robert Lobianco, Star No. 16764, charged herein, is **not guilty** of violating Rule 1, Rule 2, and Rule 14 in that the Superintendent did not prove by a preponderance of the evidence the following charges:

On or about November 7, 2013, in the Circuit Court of Cook County, Domestic Violence Division, at the criminal trial of Frank Vasquez, Case No. 13 DV 75854, Police Officer Robert Lobianco falsely testified that on July 25, 2013, he did not see Frank Vasquez opening the door when he/Officer Lobianco kicked the door in, or stated words to that effect, thereby:

- a. Violating any law or ordinance (720 ILCS 5/32-2(a) *Perjury*) in violation of Rule 1; and/or
- b. Engaging in any action or conduct which impedes the Department's efforts to achieve its policy and goals or brings discredit upon the Department, in violation of Rule 2; and/or
- c. Making a false report, written or oral, in violation of Rule 14.

See the findings set forth in paragraph no. 4 above, which are incorporated here by reference.

Officer Lobianco testified at the criminal trial that he could not say that Mr. Vasquez was in the process of opening the service door at the time he kicked in the door because he did not know what Mr. Vasquez was doing on the other side of the door. The Board credits this aspect of Officer Lobianco's testimony, which is corroborated by the video footage. Consequently, the Board finds that the Superintendent has not proven this charge.

9. The Respondent, Police Officer Kevin Fry, Star No. 15329, charged herein, is **guilty** of violating Rule 2 and Rule 14 in that the Superintendent proved by a preponderance of the evidence the following charges:

On or about July 25, 2013, Police Officer Kevin Fry falsely reported in an Original Case Incident Report that reporting officers “observed Frank Vasquez (Offender & Ex-boyfriend) on top of Cheyenne Bailey (Victim & Complainant), who was on the ground with Vasquez physically restraining Bailey,” or reported words to that effect, thereby:

- a. Engaging in any action or conduct which impedes the Department’s efforts to achieve its policy and goals or brings discredit upon the Department, in violation of Rule 2; and/or
- b. Making a false report, written or oral, in violation of Rule 14.

See the findings set forth in paragraph nos. 4 and 6 above, which are incorporated here by reference.

10. The Respondent, Police Officer Kevin Fry, Star No. 15329, charged herein, is **guilty** of violating Rule 1, Rule 2, and Rule 14 in that the Superintendent proved by a preponderance of the evidence the following charges:

On or about November 7, 2013, in the Circuit Court of Cook County, Domestic Violence Division, at the criminal trial of Frank Vasquez, Case No. 13 DV 75854, Police Officer Kevin Fry falsely testified that on July 25, 2013, he observed Frank Vasquez on top of Cheyenne Bailey at 9545 South Avenue M, or stated words to that effect, thereby:

- a. Violating any law or ordinance (720 ILCS 5/32-2(a) *Perjury*) in violation of Rule 1; and/or
- b. Engaging in any action or conduct which impedes the Department’s efforts to achieve its policy and goals or brings discredit upon the Department, in violation of Rule 2; and/or
- c. Making a false report, written or oral, in violation of Rule 14.

See the findings set forth in paragraph nos. 4, 6, and 7 above, which are incorporated here by reference.

11. The Respondent, Police Officer Kevin Fry, Star No. 15329, charged herein, is **guilty** of violating Rule 1, Rule 2, and Rule 14 in that the Superintendent proved by a preponderance of the evidence the following charges:

On or about November 7, 2013, in the Circuit Court of Cook County, Domestic Violence Division, at the criminal trial of Frank Vasquez, Case No. 13 DV 75854, Police Officer Kevin Fry falsely testified that on July 25, 2013, he and his partner pulled Vasquez off of Cheyenne Bailey, the victim, or stated words to that effect, thereby:

- a. Violating any law or ordinance (720 ILCS 5/32-2(a) *Perjury*) in violation of Rule 1; and/or
- b. Engaging in any action or conduct which impedes the Department's efforts to achieve its policy and goals or brings discredit upon the Department, in violation of Rule 2; and/or
- c. Making a false report, written or oral, in violation of Rule 14.

See the findings set forth in paragraph nos. 4, 6, and 7 above, which are incorporated here by reference.

As shown above, the Superintendent has proven that Officer Fry's testimony that he and Officer Lobianco pulled Mr. Vasquez off of Ms. Bailey while they laid on the ground was a knowing false statement made under oath. The statement that Officer Fry and Officer Lobianco pulled Mr. Vasquez off of Ms. Bailey, if believed, would tend to prove that Mr. Vasquez "forcibly pushed [Ms. Bailey] causing her to fall on the ground" as is alleged in the domestic battery complaint against Mr. Vasquez. Moreover, this statement would or could influence the trier of fact in its deliberations on the issues presented. Consequently, the statement is material.

Penalty

12. The Police Board has considered the facts and circumstances of each Respondent's conduct, and the evidence presented in mitigation, including each Respondent's complimentary

and disciplinary histories.

The Respondents each offered evidence in mitigation, which the Board has considered thoroughly. In particular, each Respondent offered the testimony of several character witnesses who had worked with them as supervisors and colleagues and attested to work ethic, diligence, and attention to detail in their preparation of their official police reports. In addition, each Respondent has an exemplary complimentary history over many years with the Chicago Police Department. Officer Lobianco was appointed in 2002 and has earned a total of 225 awards, including 7 Department Commendations, 1 Special Commendation, 2 Police Officer of the Month Awards, and 189 Honorable Mentions. Officer Fry was appointed in 2003 and has earned a total of 113 awards, including 1 Life Saving Award, 5 Department Commendations, 1 Special Commendation, and 95 Honorable Mentions. Each Respondent has no sustained complaints on his disciplinary history.

However, the Respondents' distinguished accomplishments as police officers and the positive evaluations of them do not outweigh the seriousness of the misconduct in this case. The Board finds that the Respondents' misconduct is incompatible with continued service as a police officer and warrants their discharge from the Chicago Police Department. The Respondents knowingly and intentionally falsified official police reports and lied under oath at a criminal trial. Had their testimony been believed, it is likely that Mr. Vasquez would have been convicted of one or more crimes. It is difficult to overstate the harm this would have caused. Such conduct by the Respondents is antithetical to that expected and required of a police officer, who at all times has a duty to act with honesty and integrity, not falsify reports and commit perjury in the course of one's official duties.

Each Respondent's dishonesty relates directly to his public duties as a police officer, and

renders him unfit to hold that office. Trustworthiness, reliability, good judgment, and integrity are all material qualifications for any job, particularly one as a police officer. The duties of a police officer include making arrests and testifying in court, and a police officer's credibility is at issue in both the prosecution of crimes and in the Police Department's defense of civil lawsuits. A public finding that a police officer falsified official reports and lied under oath in criminal court is detrimental to the officer's credibility as a witness and, as such, is a serious liability to the Department. *See Rodriguez v. Weis*, 408 Ill.App.3d 663, 671 (1st Dist. 2011).

The Board finds that each Respondent's conduct is sufficiently serious to constitute a substantial shortcoming that renders his continuance in his office detrimental to the discipline and efficiency of the service of the Chicago Police Department, and is something that the law recognizes as good cause for him to no longer occupy his office.

[The remainder of this page is left blank intentionally.]

POLICE BOARD DECISION

The Police Board of the City of Chicago, having read and reviewed the record of proceedings in these cases, having viewed the video-recording of the testimony of the witnesses, having received the oral report of the Hearing Officer, and having conferred with the Hearing Officer on the credibility of the witnesses and the evidence, hereby adopts the findings set forth herein by the following votes:

By votes of 8 in favor (Ghian Foreman, Eva-Dina Delgado, Michael Eaddy, Steve Flores, John P. O'Malley Jr., John H. Simpson, Rhoda D. Sweeney, and Andrea L. Zopp) to 0 opposed, the Board denies the Respondents' Joint Motion to Strike and Dismiss all charges;

By votes of 8 in favor (Foreman, Delgado, Eaddy, Flores, O'Malley, Simpson, Sweeney, and Zopp) to 0 opposed, the Board finds Respondent Police Officer Robert Lobianco **guilty** of violating Rule 1, Rule 2, and Rule 14 as set forth in paragraph nos. 6 and 7 above;

By votes of 8 in favor (Foreman, Delgado, Eaddy, Flores, O'Malley, Simpson, Sweeney, and Zopp) to 0 opposed, the Board finds Respondent Police Officer Robert Lobianco **not guilty** of violating Rule 1, Rule 2, and Rule 14 as set forth in paragraph no. 8 above; and

By votes of 8 in favor (Foreman, Delgado, Eaddy, Flores, O'Malley, Simpson, Sweeney, and Zopp) to 0 opposed, the Board finds Respondent Police Officer Kevin Fry **guilty** of violating Rule 1, Rule 2, and Rule 14 as set forth in paragraph nos. 9, 10, and 11 above.

As a result of the foregoing and for the reasons set forth in paragraph no. 12 above, the Board, by votes of 8 in favor (Foreman, Delgado, Eaddy, Flores, O'Malley, Simpson, Sweeney, and Zopp) to 0 opposed, hereby determines that cause exists for discharging each Respondent from his position as a police officer with the Department of Police, and from the services of the City of Chicago.

NOW THEREFORE, IT IS HEREBY ORDERED that the Respondent, Police Officer Robert Lobianco, Star No. 16764, as a result of having been found **guilty** of certain charges in Police Board Case No. 17 PB 2933, be and hereby is **discharged** from his position as a police officer with the Department of Police, and from the services of the City of Chicago.

Police Board Case No. 17 PB 2933
Police Officers Robert Lobianco and Kevin Fry

IT IS FURTHER ORDERED that the Respondent, Police Officer Kevin Fry, Star No. 15329, as a result of having been found **guilty** of all charges in Police Board Case No. 17 PB 2933, be and hereby is **discharged** from his position as a police officer with the Department of Police, and from the services of the City of Chicago.

These disciplinary actions are adopted and entered by a majority of the members of the Police Board who participated in these cases: Ghian Foreman, Eva-Dina Delgado, Michael Eaddy, Steve Flores, John P. O'Malley Jr., John H. Simpson, Rhoda D. Sweeney, and Andrea L. Zopp.

DATED AT CHICAGO, COUNTY OF COOK, STATE OF ILLINOIS, THIS 17th DAY OF MAY, 2018.

Attested by:

/s/ GHIAN FOREMAN
President

/s/ MAX A. CAPRONI
Executive Director

Police Board Case No. 17 PB 2933
Police Officers Robert Lobianco and Kevin Fry

DISSENT

The following members of the Police Board hereby dissent from the Findings and Decision of the majority of the Board.

[None]

RECEIVED A COPY OF
THESE FINDINGS AND DECISION
THIS ____ DAY OF _____, 2018.

EDDIE T. JOHNSON
Superintendent of Police